Neither could the Government join in one and the same count of an indictment the false representations of citizenship separately made to Siu and Hopkins. It would be an improper joinder.

Kotteakos v. U. S., 328 U. S. 748, 774.

The Government cites three cases as supporting their contention that proof that the false representation was made to Hopkins was a harmless variance. These cases are wholly inapplicable and deal with entirely different situations:

The case of *Bennett v. United States*, 227 U. S. 333, 338, reviewed a conviction for violation of the White Slave Act. The defendant was charged in one count of the indictment in the United States District Court of Ohio for having caused the transportation of one Opal Clark. The testimony disclosed that the woman transported had gone by the names of Opal and Nellie and that her true name was Jeanette LaPlante. This Court held that the variance was not fatal inasmuch as the record shows that the defendant was informed of the charge against her and the record is in such shape as to protect her against another prosecution for the same offense. A further point of variance was urged as to the second count on the ground that it alleged that the tickets were procured at Chicago, Illinois, whereas the testimony showed that they were purchased in Cincinnati. The testimony disclosed that the tickets were purchased in Cincinnati and then sent to Chicago where the women transported got them and used them for the transportation from there. This Court said, "It is not possible to imagine that the variance caused any prejudice. . . ." A third variance was asserted in that the indictment charged that the transportation of two women

and the proof was of the transportation of one. This Court said, "How what the defendant did not do can be considered material description of what she did do is not easy to imagine."

The case of *United States v. Sprinkle,* 57 F. 2d 968, 969 (C. A. 2) was a mail fraud case. There were two claims of variance; the first that testimony of false representations other than those charged in the indictment was received. The Court of Appeals held that:

> "False statements outside scheme charged are competent to show the defendant's fraudulent intent. If such false statements were part of the fraudulent scheme charged they should have been alleged as such in the indictment and proof of them without such allegations constitute a variance . . . this is clearly not such a case."

The second claim of variance was directed at the proof of mailing of the indictment letters; of this claim, the Court said:

> "It would suffice to say that proof of count six is sufficient to sustain the conviction without regard to questions of variance as to the other counts."

In the case of *Ferrari v. United States,* 169 F. 2d 353 (C. A. 9), the defendant was convicted of fraudulently concealing and facilitating the concealing of heroin, which defendant knew had been imported into the United States contrary to law. The Court held that although the indictment charged the defendant with receiving the heroin from one person and proof established another

person to be the one associated with him in concealment of the drug, variance was not fatal. The man named in the indictment as being present with appellant at the time the offense was alleged to have been committed and the other man that the evidence disclosed was there with appellant, were both present at the trial and each testified on appellant's behalf. The substantive offense in this case was not with whom he dealt but the illegal use and concealment of the drug at a specific time and place. Obviously, in the absence of surprise, the defendant could not have been effected by the variance.

In the instant case we have the precise situation of one convicted on a charge not made. The cases set forth at page 13 of our Petition and Brief, hold that a conviction upon a charge not made is sheer denial of due process.

The Government has failed to make any answer to our further position that the trial of a defendant on a charge different from that found by grand jury is violative of the Fifth Amendment to the Constitution, and that a conviction "on charge other than as made by grand jury presentment is jurisdictional and therefore void." (See cases cited our Petition and Brief, p. 14.)

We add that proof of a distinct and separate false representation of citizenship from the one charged, as here, does violence to the Sixth Amendment requirement that "in all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."

II.

The Decision of the Court of Appeals Is in Direct Conflict With the Decisions of Other Courts of Appeal Upon the Same Questions: Also, the Court of Appeals Has Decided Questions of Substance Relating to the Construction of a Statute of the United States, Which Has Not Been, but Should Be Settled by This Court.

This point is discussed at pages 7-13 of the Government's Brief in Opposition; it is discussed in our Petition and Brief at pages 14-28.

The Government, at page 13 of its Brief in Opposition, states that we argue that the false representation was not pertinent to the matter of his arrest on a gambling charge. Our position is far from being so limited. Of course, the false representation was not pertinent to the matter of his arrest on a gambling charge. Neither was it material to his booking. There is no testimony that Exhibit 5 was used by the Sheriff for any purpose whatsoever. There is only testimony covering the use and purpose of Exhibit 4, but this arrest slip did not contain the citizenship question; and as to this Exhibit the testimony was that it was used by the sheriff's office itself "for identification and the charge that they are booked on." We reiterate that U. S. citizenship has no relevancy or materiality as to any matter under consideration. Arrest of Petitioner for suspicion of bookmaking, and at most, his identity was the pertinent subject matter. Identity, of course, was fully established by age, address, color of hair and eyes, complexion, physical characteristics and fingerprints.

Counsel is entirely in error when he says that none of the appellate decisions construing the statute supports the

contention that claims of United States citizenship must have relevancy to the transaction at hand. The *Prevost* case (149 F. 2d 747 (C. A. 9)) only passed on the contention on motion to dismiss an indictment that it failed to show how and in what manner the representations of false citizenship mentioned therein were material. They held that the Court did not err in denying the Motion to Dismiss. Actually the indictment charged that the false representation of citizenship was made in connection with his selective service questionnaire and in an application for employment. The same Court in the *DePratu* case (171 F. 2d 75 (C. A. 9)) said of appellant's contention that the proof did not "sufficiently show that his claims of United States citizenship were material to the transactions at hand" that:

> "In each instance, the inquiry as to citizenship was made by public officers in furtherance of their official duty and authority. . . . Obviously, appellant's claim of U. S. Citizenship in response to such inquiry could not be said to have been made . . . to 'stop the prying of some busy body.'"

In all of the cases that we have cited, as well as those of the Government, involved the established elements of the right legally to inquire as to citizenship, deception as to material subject matter, and the perpetration of fraud. True, the Circuit Court in the instant case, referring to their opinion in the *DePratu* case said "that the question of citizenship there was material to the transactions at hand and also that the law gave the authority and imposed the affirmative duty on the officers inquiring to ascertain the citizenship status of the defendant in that action," but they were dealing with the facts in that case and that they did not say that less would not suffice [R. 294]. They do

not find that it must not be relevant but, "We hold that where some right to inquire exists or the person inquiring has a good and sufficient reason for learning the citizenship of the person asked, it is sufficient. . . ." [R. 294.] The Court of Appeals, however, further held, and which we say erroneously, that citizenship was "material in an overall system of the Sheriff's office." [R. 290.] There was no evidence, as we have pointed out, of any purpose or reason for asking the question by the Sheriff's office. One might as well conclude that a United States citrus pest inspector in an agricultural area who is making inspections to determine proper practices and procedures for the elimination or control of pests was a person who had such a right to inquire or had sufficient reason for so doing, even though it was collateral to the treatment and control of pests.

The Government cites one case that we failed to cite: *United States v. Romberg,* 150 F. 2d 116 (C. A. 2), and claims that there was no evidence in that case of a fraudulent purpose, and quote "the sole question . . . is whether the Union's executive Board had 'some . . . adequate reason for ascertaining . . . defendant's citizenship' at a 'time of deepening national crisis.'" The second Circuit in this case makes no reference at all to whether the evidence showed or did not show the existence of a fraudulent purpose. The evidence does show, though, that he did conceal his alienage from the Union through whose Joint Employment Committee he received employment with a company which was doing work for the United States Maritime Commission. This would indicate existence of a hiring hall arrangement and that employment came through the Union rather than the employer. The Union, therefore, was directly interested in

the surveillance of its members, whom they had placed on the job, in meeting union standards of competency in doing their work and in the fulfillment of their established policies as to who might be employed on defense work. The defendant was doing electrical work at the dry docks and the business agent of the Union had made a charge to the executive board against the defendant that he had done defective work at the dry docks. The executive board during the consideration of whether it should direct an investigation of the charge, at the request of the business agent asked the defendant whether he was a citizen of the United States, to which the defendant replied, "I am."

III.

As to Government's Cross-Petition for a Writ of Certiorari.

The Government seeks a review of the reversal of Petitioner Smiley's conviction on Count 1 of Indictment No. 20069 and on the count contained in Indictment No. 20604, if this Court grants the Petition of Mr. Smiley's with reference to the affirmed Count which is the basis of his Petition in case No. 124. The Government asserts at page 7 of its Petition for Certiorari (No. 213): "If the Court should determine that the petition in No. 124 should be denied, this conditional cross-petition, involving the two counts reversed by the court below, need not be considered. It is filed solely to protect the Government's interests in the event that certiorari should be granted in No. 124." To say the least, this is a most astounding declaration. It has been our conception that the invocation of the writ of certiorari was to obtain a determination by this Honorable Court on organic and vital prin-

ciples of law as a direction and guide to the subordinate branches of the Federal judiciary. Qualified petitions are an afront to the basic principles governing the issuance of writs of certiorari.

If the correctness of the decision of the Court of Appeals that (a) an alien's answer "American" to the question of his "nationality" on a booking form filled out in connection with his being held as a material witness, and (b) his answer "yes" to the question whether he was a "citizen" on a booking form filled out in connection with his being booked on a gambling charge, do not constitute false representations of United States citizenship within the meaning of Section 746(a) (18) Title 8, U. S. C., should be determined by this Court in the opinion of the Government, then there is no moral foundation for a qualified conditional Petition suggestive of a bargain with respect to the initial Petition of the Petitioner.

Aside from the question of denial of due process and the denial of Petitioner's rights under article V of the Constitution, the basic and fundamental questions posed, as set forth in Point II, pages 14-24, of our Brief, apply fully and with equal force to the reversed counts; and a decision by this Court on this phase of the case as to the affirmed count would determine all of those questions as to the reversed counts. A determination of correctness of the Court of Appeals decision on the sufficiency of the evidence as to the reversed counts in no wise affects or has any interrelationship with the problems posed on the affirmed count with respect to which the Petitioner seeks a review.

The speciousness of the Government's Petition for Certiorari is also apparent from the statement that their Petition "is filed solely to protect the Government's inter-

est in the event the certiorari should be granted in No. 124," in view of the fact that the only thing to be protected inherent in the Judgment is a thousand dollar fine on each count.

The correctness of the Court of Appeals decision in reversing these two counts may readily be justified—at least for the purposes of this response—with these brief observations: The answer "American" to the word "nationality" in view of the evidence that the petitioner was a Canadian [R. 152, 156], is a true answer; and there was not an affirmative representation of United States citizenship. As to the limited answer "citizen," it does not constitute an affirmative false representation that he was a United States citizen. Birth alone in this country is not an affirmative claim to United States citizenship. Many have been born in the United States and have been repatriated. We believe there is the further exception of children born in the United States to diplomatic representatives of foreign countries. In fact, at one time a nativeborn Indian was not a citizen of the United States. The trial court clearly defined correctly in its instructions to the jury what constitutes a false representation under the Section in question when it instructed, "You are instructed 'to represent oneself' as a citizen, as set forth in the indictment, means to hold oneself forth as, and affirmatively claim to be, a citizen of the United States." [R. 274-5.]

Respectfully submitted,

OTTO CHRISTENSEN,
Attorney for Petitioner.

JERRY GIESLER and
ROBERT A. NEEB,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1950

No. 124

ALLEN SMILEY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR A REHEARING AND STATEMENT IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

October Term, 1950

No. 124

ALLEN SMILEY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

PETITION FOR A REHEARING AND STATEMENT IN SUPPORT THEREOF.

To the Honorable Supreme Court of the United States:

Allen Smiley respectfully prays this Honorable Court to reconsider its denial of his Petition for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit, and in support thereof respectfully shows:

1. There was a denial of due process as well as a denial of Petitioner's rights under Article V of the Amendments to the Constitution.

2. The United States Court of Appeals has decided questions of substance relating to the construction of a statute of the United States contrary to the decisions of other Courts of Appeal, and which have not been, but should be, settled by this Court.

Statement in Support of Petition for Rehearing.

Petitioner was sentenced to *fine and imprisonment* in violation of subparagraph (18) of Section 746(a), Title 8, United States Code.

Point (1) is discussed at pages 1-14 of our Reply Brief, pages 6-7 of the Government's Brief in Opposition, and in our Opening Brief at pages 13-14.

We have fully set forth the record on this point in our Reply Brief at pages 1-14 because the Government's Answer was premised upon a wholly untrue set of facts. The Government's contention was—and incorrectly so—that Siu (the person to whom it is alleged a false claim of United States citizenship was made) had custody of the Petitioner while the "lower part of Exhibit 5 was being prepared, and that he (Siu) did not sign the Exhibit until it was fully completed." [R. 84-90.] It was the lower part of this Exhibit that contained the question, "U. S. Citizen?" This, we say, is not a fact. We believe the record substantiates this statement, but if there is any doubt about it, the matter is cleared up fully by the Affidavit of said Government witness, Siu, which is hereto attached as an Appendix. (The original Affidavit is on file with the Clerk of this Court.)

The fact is that the Petitioner at no time answered any question with reference to United States citizenship put to him by Siu, nor was Siu present at any time such a question was asked; further, as Siu affirms, the Petitioner at no time told him that he was a United States citizen, nor did he ever hear him so state to any other person at any time or place.

Unequivocably, the record now is that the Petitioner stands convicted of a distinct and separate offense not

charged. It is not a matter of simple variance. He stands convicted of having said to another person (Hopkins), at another time and place, that he was a United States citizen, whereas the Indictment charged that he made the false representation of United States citizenship to Siu; and the proof is that it was at another time and place than the incident with Hopkins that Siu interviewed him, at which interview nothing whatever was said about United States citizenship.

Point (2) is discussed in our Reply Brief at pages 15-20 and at pages 14-28 of our Opening Brief; the Government's Brief in Opposition discusses this question at pages 7-13. To what we have there said, we desire to make this additional comment. The Seventh Circuit Court of Appeals held in *United States v. Tandaric,* 152 F. 2d 3, 5, that the false representation which the statute prohibits is one that is made for a "fraudulent purpose," and is not ambiguous, and, "Men of common intelligence will have little difficulty in determining what is prohibited by it." But in *United States v. Frederick,* 50 Fed. Supp. 769, 771-772, the District Court said that the Act of 1940, unlike the previous acts, makes a simple false claim of citizenship, without a fraudulent or wrongful purpose, an offense. That decision was affirmed in *United States v. Frederick,* 5 Cir., 146 F. 2d 488, without discussing either the facts or the law involved in that case, but an affirmance implies an approval, *sub silentio,* of the opinion of the court below. See, also, *Prevost v. United States,* 9 Cir., 149 F. 2d 747, 748.

In *De Pratu v. United States,* 9 Cir., 171 F. 2d 75, 76, the Court said:

> "The attack upon the sufficiency of the indictment is based upon asserted necessity for allegation and

> proof of fraudulent purpose in the making of the false claim of citizenship. The present statute does not expressly so provide, and from a reading of it it readily appears, contrary to appellant's contention, that * * * [it] does not by implication or otherwise condition the outlawed offense upon the alleged existence of fraudulent purpose in the mind of the one making false claim of citizenship, although that fraudulent purpose was a necessary ingredient of the similar offense under the previous law which was superseded by said Section 746 (a) (18)."

A statute that is so worded, that courts are in disagreement as to its meaning, is too vague and ambiguous for a layman's understanding. A statute which forbids the doing of an act in terms so ambiguous that men of common intelligence must necessarily guess at its meaning, violates the first essential of due process of law. *Connally v. General Construction Co.*, 269 U. S. 385, 391; *United States v. Cohen Grocery Co.*, 255 U. S. 81, 87-88. Such ambiguity cannot be cured by judicial construction which seeks to specify "details of the offense intended to be charged." *Lanzetta v. New Jersey*, 306 U. S. 451, 453.

In *Screws v. United States*, 325 U. S. 91, Justices Roberts, Frankfurter and Jackson, in a joint dissenting opinion, said, page 153:

> "What the Constitution requires is a definiteness defined by the legislature, not one argumentatively spelled out through the judicial process which, precisely because it is a process, cannot avoid incompleteness. A definiteness which requires so much subtlety to expound is hardly definite."

A final and authoritative decision on the questions presented under this Point (2) by our Petition and Reply Brief and Petition for Rehearing is desirable, not only to Petitioner, but also to Government enforcement officials.

Conclusion.

Petitioner respectfully urges that the questions sought to be presented to this Honorable Court are substantial, relating to the construction and application of a statute of the United States, and they are such that they should be settled by this Court; and in the interest of justice, the Petition should be granted, and the judgment and sentence reversed, to cure the denial of due process that has occurred in this case by the conviction of Petitioner upon a charge not made.

Respectfully submitted,

OTTO CHRISTENSEN,
Attorney for Petitioner.

JERRY GIESLER and
ROBERT A. NEEB,
Of Counsel.

Certificate of Counsel.

Otto Christensen, attorney for petitioner, hereby certifies that the petition for rehearing herein filed is presented in good faith and not for delay; and that said petition is restricted to grounds which are confined to intervening circumstances of substantial and controlling effect, and other substantial grounds available to petitioner, although not previously presented.

OTTO CHRISTENSEN.

APPENDIX.

Otto Christensen, 1212 Spring Arcade Building, 541 South Spring Street, Los Angeles 13, California; Michigan 2801; Attorney for Petitioner.

In the Supreme Court of the United States.

Allen Smiley, Petitioner, vs. United States of America, Respondent. No. 124.

AFFIDAVIT OF JACOB E. SIU.

State of California, County of Los Angeles—ss.

Jacob E. Siu, being first duly sworn, deposes and says: that he is the Jacob E. Siu who testified as a witness on behalf of the United States of America in the case of United States v. Smiley (No. 20069);

That at no time did I ask the question appearing in Exhibit 5, "United States citizen?" of Mr. Smiley, neither at the time of my interviewing him at 414½ North Hill Street, on or about the 25th day of May, 1944, or later that day at the County Jail booking office in the presence of Milton S. Hopkins, Deputy Sheriff, or at any other time hear such a question put to Mr. Smiley. Neither on said day, or at any other time, did Mr. Smiley say to me that he was a citizen of the United States, nor did I hear him say so to any other person.

JACOB E. SIU.

Subscribed and sworn to before me this 19 day of October, 1950.

MINNIE F. CHETWOOD,
Notary Public in and for the County of Los Angeles, State of California.